

05-984 FLD 1 - 2000

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

ROY L. BROWN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Fifth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS FOR REVIEW**

I. Does Petitioner's waiver of appeal bar appeal based on a sentence assessed in violation of the U. S. Constitution, Sixth Amendment when the waiver, by its terms, allows appeal of "any punishment in excess of a statutory maximum."

**PARTIES TO PROCEEDINGS**

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**and**

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**Washington, D.C. 20530-0001**

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Petitioner, ROY L. BROWN, hereby petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit (entered September 27, 2005) affirming Petitioner's conviction and sentence for securities fraud in violation of 15 U.S.C. §77q(a) and 77x and bank fraud in violation of 18 U.S.C. §1344. A Petition for Rehearing was filed on October 11, 2005, and denied on November 4, 2005.

### OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated September 27, 2005, is styled *United States v. Roy L. Brown*, No. 03-11196, and is unpublished. A copy of this opinion is found at Appendix A. Petition for Rehearing was denied on November 4, 2005, and is found at Appendix B.

### STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

On December 17, 2004, the Court of Appeals affirmed the judgment of the District Court. Petitioner subsequently filed a Petition for Rehearing. On September 27, 2005, the Court of Appeals granted the Petition for Rehearing, withdrew the earlier opinion and substituted a new opinion. On October 1, 2005, Petitioner filed a Petition for Rehearing of the new opinion. On November 4, 2005, the Court of Appeals denied that Petition for Rehearing. This Petition for Writ of Certiorari is from the Court of Appeals opinion dated September 27, 2005, and the subsequent denial of the Petition for Rehearing.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Amendment V, U. S. Const.

No person shall be deprived of life, liberty or property without due process of law.

### Amendment VI, U. S. Const.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

## STATEMENT OF THE CASE

On May 28, 2003, Mr. Brown pled guilty to one count of securities fraud and one count of bank fraud. On November 3, 2003, Mr. Brown was sentenced to 60 months imprisonment on Count 1 and 136 months on Count 2 to run concurrent with each other.

The guideline calculations that ultimately led to the 136 month sentence were as follows:

- Base offense level under §2B1.1	6
- Loss Amount of \$9,757,063 §2B1.1(b)(1)(K)	+20
- More than 10 victims §2B1.1(b)(2)(A)(i)	+2
- Sophisticated means §2B1.1(b)(8)(C)	+2
- 1,000,000 in gross receipts from §2B1.1(b)(12)(A)	+2
- Leader/Organizer - §3B1.1(c)	+2
- Acceptance of responsibility	<u>-3</u>

Total Offense Level:	31
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With a criminal history category of II, the guideline range was 121 to 151 months. The District Court's sentence was within the range at 151 months.

The appeal in the case at bar argued under *Blakely v. Washington*, 124 S.Ct. 2531 (2004) that Mr. Brown was sentenced in violation of his rights under the U.S. Const., amend. VI. On December 17, 2004, the Court issued a brief, per curiam opinion, stating that this argument was foreclosed by *United States v. Pineiro*, 377 F.3d 464 (5<sup>th</sup> Cir. 2004)(holding *Blakely* does not apply to the United States Sentencing Guidelines). However, on January 12, 2005, the United States Supreme Court issued *United States v. Booker*, 125 S.Ct. 738, 748-756 (2005) which found *Blakely* did apply to the United States Sentencing Guidelines and held that the Sentencing Guidelines are to be advisory, rather than mandatory. *Booker* expressly overruled *Pineiro* and required the Court of Appeals to review Appellant's claims in light of *Booker*. This fact was brought to the Court of Appeals attention by way of a Petition for Rehearing. However, rather than addressing the merits of Petitioner's argument, the Court of Appeals looked to the waiver of appeal language in the Petitioner's plea agreement and dismissed the appeal.

### QUESTION FOR REVIEW

Does Petitioner's waiver of appeal bar appeal based on a sentence assessed in violation of the U. S. Constitution, Sixth Amendment when the waiver, by its terms, allows appeal of "any punishment in excess of a statutory maximum."

## REASONS FOR REVIEW

Petitioner entered a guilty plea in the District Court pursuant to a plea agreement. The plea agreement contained the following provision:

### "Waiver of Appeal

8. The defendant hereby expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. §3742, and the defendant further agrees not to contest his sentence in any post-conviction proceeding, including but not limited to a proceeding under 28 U.S.C. §2255. The defendant, however, reserves the right to appeal or contest the following: a) any punishment imposed in excess of a statutory maximum, b) any punishment to the extent it constitutes an upward departure from the guideline range deemed most applicable by the sentencing court; c) arithmetic errors in the guidelines calculations; d) any application of USSG §2F1.1(b)(5)(C) in conjunction with an application of USSG §3B1.3 in calculating the guidelines if the court applies the 1998 version of the United States Sentencing Guidelines; e) any application of USSG §3A1.1 in calculating the guidelines; and f) a claim of ineffective assistance of counsel."

The Court of Appeals opinion dismissing the appeal simply stated:

"Brown appeals following his guilty plea to securities fraud, in violation of 15 U.S.C. §§77q(a) and 77x, and bank fraud, in violation of 18 U.S.C. §1344. Brown pleaded guilty pursuant to a written

plea agreement that contained a waiver of the right to appeal. We may examine Brown's plea agreement sua sponte to determine whether we may hear his claims. United States v. Martinez, 263 F.3d 436, 438 (5th Cir. 2001). We conclude that the appeal is barred by the plain language of Brown's knowing and voluntary appeal waiver in the plea agreement. See United States v. Bond, \_\_\_ F.3d \_\_\_, No. 04-41125, 2005 WL 1459641, at \*3-4 (5th Cir. June 21, 2005); United States v. McKinney, 406 F.3d 744, 746-47 (5th Cir. 2005).

PETITION FOR REHEARING GRANTED; APPEAL DISMISSED."

While the majority of opinions from the Courts of Appeals have ruled that waiver of appeal language similar to this does not allow appeal based on *Booker* error, this is not a unanimous view. In *United States v. Luebbert*, 411 F.3d 602 (6th Cir. 2005), Judge Moore dissented from a dismissal of an appeal under similar circumstances. Judge Moore's opinion directly and clearly addressed the reasons why this waiver of appeal language should not bar appeal based on a sentence assessed in violation of the Sixth Amendment as interpreted in *Booker*. Based on the importance of this dissenting opinion, it is set out in its entirety under Appendix C. As Judge Moore stated, the language "any sentence imposed in excess of the statutory maximum" is not without ambiguity. This language could be reasonably interpreted to allow an appeal of a sentence in excess of the statutory maximum as interpreted in *Booker* and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

In fact, Judge Moore is correct. Since this Court has clearly defined statutory maximum for these purposes in *Blakely* and *Booker* as a "sentence a judge may impose solely

on the basis of the facts reflected in the jury verdict or admitted by the defendant," this should be the guiding language in determining if there was a waiver of the right to appeal a sentence imposed in violation of *Booker*.

Moreover, the language of the appeal waiver in the case at bar is even more ambiguous than that discussed by Judge Moore. Here, the waiver allows the defendant to appeal a "punishment imposed in excess of a statutory maximum." By contrast the language discussed in *Luebbett* and other cases refers to a sentence in excess of "the statutory maximum." The language here makes clear that the parties intend that there is more than one statutory maximum. There is the statutory maximum for *Booker* purposes and the statutory maximum under the applicable statute. Petitioner is allowed to appeal a sentence in excess of either statutory maximum.

It is a violation of due process under the U. S. Constitution, Fifth Amendment, to prohibit an appeal when the defendant has a statutory right to appeal. *See, Halbert v. Michigan*, 125 S.Ct. 2582 (2005); 18 U.S.C. §3742. When the right to an appeal is provided the right should not be infringed by unconstitutional or unreasonable restrictions. Not allowing an appeal in the situation present here is just that sort of unreasonable restriction that should not be allowed.

**CONCLUSION**

Based on the foregoing, Petitioner prays that this Court grant this Petition.

Respectfully submitted,

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Attorney for Petitioner



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**APPENDIX A**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**Case No. 03-11196**

**[Filed September 27, 2005]**

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UNITED STATES OF AMERICA,	)
Plaintiff-Appellee;	)
	)
v.	)
	)
ROY L BROWN,	)
Defendant-Appellant.	)

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:03-CR-164-ALL-N

**ON PETITION FOR REHEARING**

Before KING, Chief Judge, and DeMOSS and CLEMENT,  
Circuit Judges. PER CURIAM:\*

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Roy L. Brown petitions for panel rehearing in light of the holding in United States v. Booker, 125 S. Ct. 738 (2005), that Blakely v. Washington, 124 S. Ct. 2531 (2004), is applicable to the Federal Sentencing Guidelines. We now GRANT the petition for rehearing, withdraw our earlier opinion, and substitute the following. See FED. R. APP. P. 40(a)(4)(c).

Brown appeals following his guilty plea to securities fraud, in violation of 15 U.S.C. §§ 77q(a) and 77x, and bank fraud, in violation of 18 U.S.C. § 1344. Brown pleaded guilty pursuant to a written plea agreement that contained a waiver of the right to appeal. We may examine Brown's plea agreement sua sponte to determine whether we may hear his claims. United States v. Martinez, 263 F.3d 436, 438 (5th Cir. 2001). We conclude that the appeal is barred by the plain language of Brown's knowing and voluntary appeal waiver in the plea agreement. See United States v. Bond, \_\_\_ F.3d \_\_\_, No. 04-41125, 2005 WL 1459641, at \*3-4 (5th Cir. June 21, 2005); United States v. McKinney, 406 F.3d 744, 746-47 (5th Cir. 2005).

PETITION FOR REHEARING GRANTED; APPEAL DISMISSED.



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**APPENDIX B**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**Case No. 03-11196**

**[Filed November 4, 2005]**

<hr/> UNITED STATES OF AMERICA,	)
Plaintiff-Appellee;	)
	)
v.	)
	)
ROY L BROWN,	)
Defendant-Appellant.	)
<hr/>	)

Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:03-CR-164-ALL-N

**ON PETITION FOR REHEARING**

Before KING, Chief Judge, and DeMOSS and CLEMENT,  
Circuit Judges.

IT IS ORDERED that the petition for rehearing is  
DENIED.

4a

ENTERED FOR THE COURT:

/s/ Carolyn King  
UNITED STATES CIRCUIT JUDGE

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**APPENDIX C**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**Case No. 03-5598**

**[Filed June 1, 2005]**

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UNITED STATES OF AMERICA,	)
Plaintiff-Appellee;	)
	)
v.	)
	)
FREDERICK BEN LUEBBERT,	)
Defendant-Appellant.	)

---

**DISSENT**

MOORE, Circuit Judge, dissenting.

Because I believe that Luebbert's plea agreement does not unambiguously waive Luebbert's right to raise a Sixth Amendment challenge to his sentence on the basis of *United States v. Booker*, 160 L. Ed. 2d 621, 125 S. Ct. 738-(2005), I respectfully dissent.

Luebbert's plea agreement explicitly provides that Luebbert has not waived his right to appeal "any sentence imposed in excess of the statutory maximum." Joint Appendix

at 12. The scope of this reservation of appellate rights is ambiguous, however, because the plea agreement does not explain when a sentence will be deemed to be “in excess of the statutory maximum.” While I agree with the majority that it is reasonable to interpret the “statutory maximum” exception as “referring to the upward limit of the statute charged in the indictment to which the defendant pled guilty,” Maj. Op. at 2, I disagree with the majority that this is the *only* reasonable interpretation of the “statutory maximum” exception.

In *Booker and Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), the Supreme Court explained that when a sentence rests on judge-found facts rather than facts found by a jury or admitted by the defendant, the sentence exceeds the relevant “statutory maximum.” See *Booker*, 125 S. Ct. at 749 (“Our precedents . . . make clear ‘that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*’”) (quoting *Blakely*, 124 S. Ct. at 2537). Thus, when a defendant raises a *Booker*-based Sixth Amendment challenge to his or her sentence based on judicial fact-finding, the defendant can be understood to be claiming that his or her sentence is “in excess of the statutory maximum.”

Unlike the majority, I believe that it is more appropriate to treat the statutory-maximum exception as ambiguous rather than to speculate about the parties’ intended meaning. See *Smith v. Stegall*, 385 F.3d 993, 999 (6th Cir. 2004) (“One fundamental principle of contract interpretation is that primary importance should be placed upon the words of the contract. Unless expressed in some way in the writing, the actual intent of the parties is ineffective, except when it can be made the basis for reformation of the writing.”) (internal quotation

marks and citation omitted). Because “ambiguities in a plea agreement must be construed against the government,” *United States v. Fitch*, 282 F.3d 364, 367-68 (6th Cir. 2002); see *United States v. Johnson*, 979 F.2d 396, 399-400 (6th Cir. 1992) (“Both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in the plea agreements.”) (internal quotation marks and citation omitted), the statutory-maximum exception in Luebbert’s plea agreement should be construed as permitting Luebbert to appeal his sentence on *Booker* grounds. See *United States v. Cortez*, 120 Fed. Appx. 535 (5th Cir. 2005) (“The waiver in Cortez’s plea agreement contained an exception for sentences imposed above the statutory maximum. Thus, out of an abundance of caution and because appellate-waiver provisions are to be construed against the Government, the court will consider Cortez’s *Blakely* argument.”) (citation omitted); see also *Morris v. United States*, 125 S. Ct. 1959, 161 L. Ed. 2d 769, 2005 WL 697344 (2005) (granting certiorari, vacating, and remanding for resentencing in light of *Booker* in case in which petition for certiorari argued that “statutory maximum” exception in defendant’s plea agreement allowed review of defendant’s *Booker* claim, notwithstanding plea agreement’s waiver-of-appeal provisions).

Thus, I respectfully dissent.